

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.

Application 05-02-027

**ADMINISTRATIVE LAW JUDGE'S RULING  
REGARDING THE MOTION OF GREENLINING INSTITUTE FOR  
A SUBPOENA TO COMPEL APPEARANCE OF SBC CEO  
EDWARD WHITACRE AND TO REQUIRE ADDITIONAL WITNESSES**

This ruling addresses the following Motions of Greenlining Institute (1) for the Issuance of a Subpoena to Compel the Appearance of SBC Chief Executive Officer (CEO) Edward Whitacre ("Greenlining Motion"), (2) for the production of two additional senior SBC executives as witnesses. The motion for an order issuing a subpoena to compel the appearance of CEO Edward Whitacre is denied. The request is granted, however, for SBC to produce one additional witness, at the senior officer level, who is qualified to answer questions concerning the areas of inquiry outlined by Greenlining, as discussed further below.

### **Position of Greenlining**

Greenlining set forth its position in a written motion filed on July 20, 2005, and also presented oral arguments in support of its proposal at the PHC on July 29, 2005. Greenlining argues that Whitacre should be made available for cross-examination in this proceeding because, as the CEO of SBC, he sets the policy and direction of the company, particularly during times of major mergers and acquisitions that are likely to radically alter the telecommunications landscape. Greenlining argues that Whitacre has led SBC through prior mergers, and has devised many extraordinary acquisitions and mergers that have led to fundamental changes in telecommunications service. Greenlining claims that Whitacre is the only witness who has any information regarding the likelihood of additional or complimentary acquisitions by SBC that could present unique opportunities to provide a technological level playing field for underserved communities.

In addition to Whitacre, Greenlining requests that two senior-level executives be produced as additional witnesses who are qualified as experts to answer Greenlining's questions about merger policy. Greenlining also requests that specific witness experts be produced in the areas of philanthropy, executive compensation,<sup>1</sup> supplier diversity, top management diversity, and universal lifeline telephone service (ULTS) issues.

If SBC does not produce Ed Whitacre, Greenlining claims it will require substantially more time to conduct cross-examination of the remaining SBC witnesses. Specifically, if Whitacre does not appear, Greenlining requests

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<sup>1</sup> Greenlining seeks to probe alleged disparities between levels of executive compensation and philanthropic giving.

5 hours of time to cross-examine the two Senior SBC Executives and the SBC economist that have provided direct and rebuttal testimony in this proceeding. Furthermore, Greenlining requests an additional 1.5 hours for SBC's key expert on philanthropy; 2.5 hours for SBC's expert on executive compensation; 2 hours for SBC's expert on supplier diversity; 2 hours for SBC's expert on diversity, including the diversity of SBC's Board of Directors and top management; and 1 hour for SBC's expert on ULTS (if not otherwise covered). However, if allowed to cross-examine Ed Whitacre before these witnesses, Greenlining anticipates that it will reduce its estimated times for the other witnesses by at least half.

### **Position of Applicants**

Applicants filed a response on July 27, 2005, in opposition to the Motion, and presented oral argument at the July 29 PHC. Applicants argue that the two SBC witnesses who have submitted testimony—James Kahan, Senior Executive Vice President of Corporate Development, and Christopher Rice, Executive Vice President for Network Planning and Engineering—will provide testimony regarding the public benefits of the merger to California, and that Greenlining will be able to cross-examine them at the evidentiary hearings. Applicants argue that nowhere in its motion does Greenlining articulate a single question or area of inquiry that Whitacre could address but Kahan or Rice could not. Before July 14, Greenlining did not propound any discovery seeking information from Whitacre.

The Code of Civil Procedure, which establishes the limits of the Commission's subpoena power, provides that non-resident employees of parties may not be subpoenaed to appear at hearings in California. On that basis, Applicants argue that Greenlining's motion should be denied.

Applicants further argue that prior to its motion, Greenlining had ample opportunity to conduct discovery. Greenlining served two sets of data requests before June 24,<sup>2</sup> totaling 73 separate questions. Greenlining's data requests covered a wide range of topics, such as minority contracting, the composition of SBC's board of directors and SBC's philanthropic contributions.<sup>3</sup> Greenlining propounded the first data request set on SBC on February 7, 2005, even before Applicants had filed their Joint Application. Takemoto Decl. Ex. A. In none of these data requests did Greenlining request information about Whitacre's role in or statements about the merger. *Id.* ¶ 4.

Applicants also point out that Greenlining did not attempt to notice Whitacre's deposition. While not conceding that Greenlining could properly notice Whitacre's deposition since he is not a testifying witness in this proceedings, Applicants note that Greenling let the June 24 and July 15 discovery deadlines pass without even attempting to do so. Applicants argue that such failure reinforces the conclusion that Greenlining's request to subpoena Whitacre

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<sup>2</sup> The ALJ's Ruling Denying Motion to Extend the Schedule and Granting in Part Discovery Limits, filed June 22, 2005, provides that "[p]arties shall be permitted to continue propounding discovery up until June 24, 2005. . . ." The ruling further provides that "parties shall be permitted to conduct additional discovery, as warranted, *relating to Applicants' Rebuttal Testimony*" but that "[d]iscovery relating to the Applicants' Rebuttal Testimony shall be served by July 15" (emphasis added). Greenlining served four additional sets of discovery on SBC after June 24, 2005 seeking information not related to Applicants' rebuttal testimony. Consistent with the ALJ's June 22 ruling, SBC has objected to responding to these data requests.

<sup>3</sup> See Declaration of Ryan Takemoto In Support of Applicants' Reply to the Motion of Greenlining Institute for the Issuance of a Subpoena to Compel the Appearance of SBC CEO Edward Whitacre ("Takemoto Decl.") Ex. B (Data Requests 1-6, 1-24, 1-34).

for the evidentiary hearings is motivated by a desire to harass Applicants rather than by any belief Whitacre's testimony is necessary.

Greenlining asserts that "Mr. Whitacre has regularly taken a unique and often positive leadership role with respect to his company's involvement in the communities that his company serves" and that "he has devised many extraordinary acquisitions and mergers that have led to fundamental changes in telecommunication service. . . ." <sup>4</sup> See Mot. at 2. While this may be true, Applicants argue, it does not establish why Whitacre's appearance is necessary. SBC Witness Kahan had primary responsibility for negotiating the merger for SBC. Kahan, as well as Rice, will testify regarding the purpose and effect of the merger, and Greenlining will have a full and fair opportunity to cross-examine these witnesses. Applicants thus argue that subpoenaing Whitacre would serve no purpose other than to harass Whitacre and unnecessarily delay the orderly presentation of evidence at the hearing.

## **Discussion**

Greenlining's motion is denied for a subpoena to compel the appearance of Whitacre. The Applicants have the responsibility for the selection of the specific individuals to appear as witnesses in support of the application. Applicants have not chosen to offer Whitacre as one of its witness in this proceeding. Greenlining has not shown that its due process rights are prejudiced in any way

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<sup>4</sup> Greenlining also claims that Whitacre "is the only witness who has any information regarding the likelihood of additional or complimentary acquisitions by SBC that could present unique opportunities to provide a technological level playing field for underserved communities." *Id.* at 2. But discussion of subsequent acquisitions by SBC is inherently speculative and, in any event, such other potential acquisitions are not the subject of this current proceeding.

unless a subpoena is issued ordering the specific appearance of Whitacre. Greenlining has not established that Whitacre is the only person who could provide responsive testimony regarding Greenlining's questions at issue. Accordingly, since SBC has not elected to produce Whitacre as a witness, there is no reasonable basis to order that a subpoena be issued for his appearance in the California proceeding.

On the other hand, Greenlining has made a persuasive point that the Applicants should produce one additional witness who is qualified to provide expert testimony under oath relating to the specific areas of areas of philanthropy, executive compensation, supplier diversity, top management diversity, and ULTS issues, as identified by Greenlining. These areas as identified by Greenlining are relevant within the spectrum of issues as to whether, or under what conditions, the proposed merger is in the public interest. In order for the evidentiary record to be complete regarding these issues, it is appropriate for an expert witness to be produced who can adequately address questions in these areas.

Accordingly, the Applicants are hereby directed to produce one additional witness who has the expert qualifications to respond to Greenlining's cross-examination questions concerning these specific areas. The witness shall be at the executive officer level, and knowledgeable concerning the above-referenced subject areas, particularly as they relate to how company policies in these areas are affected by the merger. The Applicants shall provide notice by email no later than close of business on Friday August 5, 2005 to the ALJ and the service list concerning the identity of the additional witness that it has selected. The specific dates for this witness to appear to testify will be addressed on the first day of evidentiary hearings on August 8, 2005.

Although an additional witness shall be produced pursuant to Greenlining's request, the time that Greenlining claims that it needs for cross-examination is clearly overstated and excessive. Greenlining has not justified why it needs twice as much time for cross-examination merely because Whitacre doesn't appear. Even the reduced estimates provided by Greenlining, assuming Whitacre were to appear, are still unduly excessive. Greenlining will be provided a reasonable amount of time for cross-examination, but will not be permitted to waste hearing time with unnecessary or excessive cross-examination.

**IT IS RULED** that:

1. The motion of Greenlining for an order to subpoena Chief Executive Officer, Edward Whitacre is hereby denied.
2. Applicants are hereby required to produce one additional witness, at the executive officer level, who is qualified to testify regarding the areas of inquiry outlined above, as identified by Greenlining. Applicants shall identify the witness by email no later than Friday August 5, 2005, pursuant to the terms and conditions discussed above.

Dated August 2, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer  
Administrative Law Judge

## **CERTIFICATE OF SERVICE**

I certify that I have by mail, and by electronic mail, to the parties for whom an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Regarding the Motion of Greenlining Institute for a Subpoena to Compel Appearance of SBC CEO Edward Whitacre and to Require Additional Witnesses on all parties of record in this proceeding or their attorneys of record.

Dated August 2, 2005, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

## **N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.